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CC Docket No 96-95
~~CCB/CPD 97-30~~

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

RECEIVED
AUG 12 1998

In the Matter of)

Request by ALTS for Clarification of the)
Commission's Rules Regarding Reciprocal)
Compensation for Information Service)
Provider Traffic)

CCB/CPD 97-30

COMMENTS OF XCOM TECHNOLOGIES, INC.

XCOM Technologies, Inc. ("XCOM"), through its counsel, submits its Comments in response to the Commission's Notice in the above-referenced matter. As a new entrant into telecommunications markets, XCOM is vitally concerned with the issues raised by the letter request of the Association for Local Telecommunications Services ("ALTS"). NYNEX and other Regional Bell Operating Companies ("RBOC") appear to have recently adopted a deliberate strategy intended to foreclose competition for one of the fastest growing segments of the local exchange service market. This newly announced uniform policy, if permitted to continue, can effectively eliminate an important component upon which many new entrants, including XCOM, have relied in entering or planning to enter the local exchange market. The Commission, as ALTS requests, should immediately advise the RBOCs that its long standing policies support the treatment of calls to Internet Service Providers ("ISPs") as local calls for purposes of local call compensation under the Telecommunications Act of 1996. This policy is not new and the Commission has done nothing to change that policy.

XCOM is presently authorized to provide local exchange service in Massachusetts. As the ALTS letter indicates, NYNEX, which provides local exchange service in Massachusetts, was one

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of the first RBOCs to announce this unilateral revision of compensation policy. Among the RBOCs issuing this recent spate of policy announcements, NYNEX also has the distinction of being the first RBOC to have received a response to its effort from one of its regulators.¹ As the ALTS petition also demonstrates, the Staff of the New York Public Service Commission promptly advised NYNEX that its unilateral announcement of a change in its treatment of compensation for the termination of local calls to ISPs constituted a change in NYNEX's New York tariff and in Commission policy that NYNEX cannot do on a unilateral basis. The Staff also advised NYNEX that until and unless the Commission made such a change in policy, NYNEX is required to continue to include local calls to ISPs as calls subject to the Telecommunications Act of 1996 ("1996 Act") reciprocal compensation requirements.

This Commission should adopt the same approach. The Commission should advise RBOCs that its policy on the treatment of local calls to ISPs as local calls has not changed and that until and unless it changed, the RBOCs are required to pay reciprocal compensation under Section 251(b)(5) of 1996 Act.

THE RBOC'S ACTION IF ALLOWED TO CONTINUE WILL HAVE A SUBSTANTIAL NEGATIVE IMPACT ON DEVELOPMENT OF LOCAL EXCHANGE COMPETITION

Given this Commission's clear and repeated position on the issue of the relationship between information and enhanced service providers and Title II common carriers, the RBOCs own treatment of this type of call for its ISP customers and the agreements entered into by the RBOCs with new entrants, the sudden emergence of this issue initially may seem odd. It is not. All of the RBOCs

¹ XCOM notes that a number of commissions in U S West's region have addressed this issue in the context of state arbitrations under the 1996 Act. In each case, U S West lost.

appear to have determined to reverse course on this issue (at the same time) for the simplest of reasons -- local competition had begun to work in this particular market segment. Because the RBOCs found themselves in the position of having to pay their new competitors for the new entrants' provision of service to the RBOC the RBOCs appear to have adopted an approach that is not atypical of a monopolist. Basically, they appear to be saying if we say it is so loud enough and long enough, it will be so.

While such an approach may have been effective when RBOCs were the only game in town, the Commission must not allow it to be so in the new world envisioned in the 1996 Act. If competition is ever to occur in local exchange markets, the RBOCs must be made to understand that the rules have changed in very fundamental ways. Unilateral revisions of policy by the RBOC intended to eliminate competition simply cannot be allowed.

Entry into the local exchange market is an expensive proposition. As we have seen, new entrants must regularly seek new capital. This will be difficult, if not impossible to do, if every time new entrants develop a service competitive to the RBOCs, the RBOCs are allowed to change the rules to eliminate any profit from such services.

The new entrant, like the RBOC, incurs costs to terminate local calls. Under the 1996 Act, both the RBOC and the new entrant are entitled to obtain compensation for the termination of calls from the end user of one to the end user of the other. There is nothing in the 1996 Act or the Commission's rules that allow the RBOCs to simply determine to withhold compensation for costs incurred in terminating such calls. That is, however, exactly what we have here.

The real world impact of allowing the RBOCs to change the rules in this way are clear. The new entrant, rather than competing for the business of the ISPs will have to withdraw from that

market. A new entrant simply cannot afford to provide service without compensation. The RBOCs will have effectively cordoned off what is almost certainly the fastest growing segment of the local exchange market. This so clearly violates the fundamental tenets of the 1996 Act that it is unlikely that anyone other than monopolists would even attempt the effort.

THE COMMISSION'S POLICY TREATS ISP CALLS AS LOCAL CALLS

The Commission for a number of years has addressed issues relating to the convergence between telephone service and other technologies. The Commission in these instances has recognized the clear distinction between common carriers providing telephone services and end users providing different services utilizing telecommunications in providing the end users a product or service.² While the Commission regulates common carriers under Title II, it does not have that form of jurisdiction over end users.

Consistent with this analysis, the Commission has not attempted to regulate end users. ISPs under this analysis are such end users. The Commission's ability to regulate ISPs, as end users, has been made clearer by the 1996 Act which states a specific policy decision not to regulate the Internet.³

² *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, Docket No. 20828 (rel'd May 2, 1980), at para. 119; 47 C.F.R. §64.702(a) ("Enhanced services are not regulated under Title II of Act.") Internet access is an enhanced service. *Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, CC Docket No. 96-262 (rel. Dec. 24, 1996) at para. 284. *Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, para. 2 n.8 (1988). In its First Report and Order regarding Access Charge Reform, the Commission reaffirmed this position explicitly and declined to impose access charges on ISPs. *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 (rel. May 17, 1997), paras. 344-348.

³ 47 U.S.C. § 230(b)(2).

The RBOCs cannot be allowed to simply disregard this policy in an effort to cripple new entrants. The Commission's recent decisions on Universal Service and Access Reform clearly restate Commission policy that information service providers are end users and are to be treated as such. ISPs as end users will not be expected to contribute to the Commission's Universal Service Fund.⁴ ISPs as end users will not be required to pay access charges to incumbent LECs.

Nothing the Commission has done in any way supports the RBOC's position. The Commission should make that clear in its response to the ALTS request.

THE RBOC'S OWN ACTIONS UNDERMINE THEIR POSITION

The RBOCs willingness to fly in the face of the facts and the law are underscored by the fact that they totally disregard the fact that they treat ISP customers as local exchange subscribers. The ISP buys local exchange service to allow its end users to reach the ISP. They obtain this service from the local exchange tariff. There is simply no rationale which would treat ISPs as subscribers to local calls when served by a LEC and as something else when served by a CLEC. It defies logic as well as the law. Such an approach is clearly discriminatory.

Not only do the RBOCs treat the local calls to ISPs as local calls, they treat other calls which are clearly telecommunication services and not information services in the same manner. In Massachusetts, NYNEX offers a remote call forwarding service which provides automatic forwarding of all incoming calls placed to a local number. Under its tariff, this telecommunications

⁴ *Federal State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, FCC 97-157 (May 8, 1997) at 789.

service is treated as two severable transactions.⁵ The end user calls a local number. The call hits NYNEX's switch, it is then routed to the remote call forwarding customer's designated number. Under the tariff, the calling party is charged the appropriate local usage rate for the call it makes to the local number. The end user subscribing to remote call forwarding is then charged a separate charge for the transmission between that local number and the number to which the call is then forwarded. NYNEX clearly treats this call as consisting of two separate components, a call to the dialed local number and a second call to the remote location. It is impossible to see how NYNEX can provide and charge for this service in this manner and argue that a call to a local number to an ISP is actually one call because the ISP (local called number) uses some other communication service to provide its nontelecommunications product.

In the remote call forwarding situation, the call is carried throughout by the same common carrier and is clearly a telecommunications service. In the ISP environment, the local call terminates at the ISP, a noncommon carrier, that then places a separate call or calls to various designations possibly using multiple providers. Despite this, NYNEX is telling new entrants that the ISP call from end to end is a single call and, therefore, not eligible for local call termination compensation.

Bell Atlantic in filing for its own service to ISPs, makes the appropriate nature of the call crystal clear. Bell Atlantic's Comparably Efficient Interconnection ("CEI") plan filed with the FCC states that, "For dial up access, the end user will place a local call to the Bell Atlantic Internet hub

⁵ New England Telephone and Telegraph Company, Exchange and Network Services D.P.U. Mass. No. 10, Part A §§ 7.1.1 and 7.1.2.

site from either a local residence or business line . . . Bell Atlantic's [ISP] vendor will subscribe to local telephone service . . . to receive the call."⁶ We couldn't agree more.

CONCLUSION

The issues are clear. The Commission should promptly advise the RBOCs that they cannot unilaterally make the rules. A local call is a local call whether it terminates to a CLEC ISP customer or a LEC ISP customer. Any other result violates the Act.

Respectfully submitted,



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Date: July 17, 1997

⁶ *Offer of Comparably Efficient Interconnection to Providers of Enhanced Internet Access Services*, Amendment to Bell Atlantic Plan to Expend Service Following Merger With NYNEX, CCB Pol. 96-09 (received May 5, 1997, at 3 (emphasis added)).

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 1997, copies of COMMENTS OF XCOM TECHNOLOGIES, INC. were hand-delivered to the following:

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